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No. 95-2074

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F.FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Commonwealth of Virginia and its citizens have been deeply committed to religious freedom since the beginning days of the Republic. It was here that Thomas Jefferson authored the Virginia Statute of Religious Freedom which later served as a model for the First Amendment to the U.S. Constitution. And Virginians James Madison and Thomas Jefferson played leading roles in the drafting and adoption of the First Amendment which preserved the freedom of religious exercise for the entire nation.[1]

Indeed, so ardent is the Commonwealth's concern for religious freedom that it filed an amicus brief in opposition to the policies of its own public university in *Rosenberger v. The Rector and Visitors of the University of Virginia*, a case in which this Court struck down the University's practice of discriminating against Christian students in its student fee allocations. 115 S. Ct. 2510 (1995).

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[1] "[T]he provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson v. Board of Educ.*, 330 U.S. 1, 13 (1947).

The Commonwealth further is concerned that the parties' briefs may not have presented the full range of legal alternatives the Court has available to resolve the current dispute, as well as to resolve the on-going debate over the Religious Freedom Restoration Act's ("RFRA" or "Act") constitutionality and its practical implications for state governments. The Commonwealth believes that the best alternative the Court has is simply to reverse its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). By reversing *Smith*, the Court could resurrect the First Amendment's protection for religious freedom sought by the Archbishop of San Antonio and other people of faith while avoiding the problematic constitutional and practical concerns many states have voiced about RFRA.

The Commonwealth of Virginia agrees with the many legal scholars and religious organizations who responded to *Smith* that its reasoning was wrong and must be reversed. Religious organizations as diverse as the American Baptist Churches, the American Jewish Congress, the Presbyterian Church, the National Council of Jewish Women, the Church of Jesus Christ of Latter-

day Saints and the North American Council for Muslim Women have advocated the kind of heightened constitutional protection for religious freedom which the Commonwealth proposes here.[2] Thus the Commonwealth of Virginia submits this brief in the interest of expressing its full support for the protection of its citizens' religious freedoms against intrusive government interference, and in proposing the most jurisprudentially sound manner of doing so.

SUMMARY OF ARGUMENT

In *Employment Division v. Smith*, this Court held that facially neutral laws which have incidental effects on the exercise of religion do not violate the First Amendment if the government can demonstrate a rational basis for the law. 494 U.S. at 888-89. Prior to *Smith*, government could justify restrictions upon the exercise of religion only by meeting the most exacting scrutiny,

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[2]For a list of several religious organizations which advocate heightened constitutional scrutiny for religious freedom, *see* 139 Cong. Rec. S14350, S14362 (remarks of Senator Hatch). For a list of legal scholars, *see* James E. Ryan, *Smith and The Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1409-10 and n.15 (1992).

which required the government to demonstrate that its restriction served a compelling interest and adopted the most narrowly tailored means of achieving that interest. *See Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Thus, *Smith* relaxed the burden imposed upon government to justify restrictions upon religious freedom and paved the way for intrusive government regulation of religious exercise.

In an effort to resurrect the pre-*Smith* compelling interest test, Congress enacted the Religious Freedom Restoration Act in 1993. 42 U.S.C. § 2000bb *et seq*. The Act provides that government may not impose a restriction upon religious exercise unless the government demonstrates that the restriction "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The Act codifies the pre-*Smith* compelling interest test for all laws of general application:

> The purposes of this Act are to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide

> a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b).

Congress's passage of RFRA raised several constitutional questions of the kind raised here by the City of Boerne, Texas, such as whether Congress exceeded its authority under the Fourteenth Amendment (a federalism concern) and whether Congress encroached upon the role of the judiciary (a separation of powers concern). These questions have been litigated in numerous cases since RFRA was enacted with varying results.

It is the position of the Commonwealth of Virginia that RFRA is well-intentioned and that the compelling interest test it codifies is the proper level of scrutiny for most spheres of government regulation of religious exercise. However, the Commonwealth believes that the First Amendment constitutionally compels that level of scrutiny in any event and that *Smith* was wrongly decided. The problem is not RFRA, but the *Smith* opinion it attempts to undo.[3] Therefore, the Court should

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[3] "[T]he two key assumptions of the RFRA are that *Smith* was wrongly decided as a matter of constitutional law — indeed, obviously and tragically wrong might be a more apropos description — and that a legislative reassertion

overturn *Smith* for the reasons stated below and reaffirm the Constitution's protection for religious freedom against intrusive government regulation, thus obviating the need for resort to a legislatively-enacted protection subject to repeal by some future Congress.

ARGUMENT

A.

Smith Was Wrongly Decided And Should Be Overturned.

In *Smith* this Court held, by a 5-4 vote (Justice O'Connor concurring on different grounds), that government need show only a rational basis to justify a law of general applicability which restricts religious exercise. The Court reasoned that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his

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of past doctrine and the accompanying doctrinal tests will provide a proper and effective cure for the Court's flawed interpretation of the Constitution." Allan Ides, *The Text of the Free Exercise Clause As A Measure of Employment Division v. Smith and the Religious Freedom Restoration Act*, 51 Wash & Lee L. Rev. 135, 137 (1994).

religion prescribes (or proscribes).'" 494 U.S. 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring)). By so holding, the Court abandoned the compelling interest test for governmental restrictions on religious exercise. *Id.* at 888. The Supreme Court should reverse *Smith* and resurrect the compelling interest test for several reasons.

First, *Smith* too narrowly construed the protection afforded by the First Amendment for religious exercise. *Smith* reasoned that the First Amendment's compelling interest standard applies only to government restrictions specifically targeting religious exercise, not to government restrictions of general applicability which incidentally impact religious exercise. That interpretation is too narrow because a facially neutral law can just as severely, if not more severely, restrict one's exercise of religion as a law specifically targeted at religion. In both circumstances, a person's freedom to exercise religion should be the Constitution's and this Court's paramount concern.

Second, *Smith* reasoned that application of a compelling interest test to laws of general applicability would create a

universal exception for persons of faith from compliance with the law. The Court criticized that result:

> [W]hat [strict scrutiny] would produce here — a private right to ignore generally applicable laws — is a constitutional anomaly.

494 U.S. at 886.

The so-called "constitutional anomaly" is precisely that: constitutional. Such a right of religious exercise is expressly provided by the First Amendment and is wholly consistent with the precious and delicate freedom at stake. It is precisely because of the importance of free religious exercise, a right so precious that our forefathers braved the Atlantic and settled in a wilderness to obtain it, that the First Amendment granted special protection for that sphere of human activity.

Of course, there is substantial merit to the argument that an exception for sincere religious exercise is not anomalous at all. *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1137-1138 (1990).

Third, *Smith's* reasoning that strict scrutiny would visit what the Court termed "a parade of horribles" upon a wide range

of facially neutral laws is exaggerated. As one scholar has demonstrated, even under the compelling interest test applied prior to *Smith*, many government restrictions survived legal challenge. *See* James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, Appendices A & B (1992) (showing that the vast majority of statutes challenged have been upheld).[4]

The many cases sustaining government action prior to *Smith* demonstrate that not only is *Smith's* "parade of horribles" hyperbole, but it misses a critical point. As a matter of constitutional jurisprudence, it is the heightened protection for religious freedom which matters *most* to the community of faith, not necessarily the results of each individual challenge. The compelling interest test guarantees that when one's religious exercise is impinged, a court will apply the strictest level of legal scrutiny available under the Constitution. The compelling interest

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[4]Indeed, one would have expected the Oregon criminal law prohibiting drug use, which was at issue in *Smith*, to be upheld in light of the state's compelling interest in criminal law enforcement. *See Smith*, 494 U.S. at 903-906 (O'Connor, J., concurring).

test does not guarantee victory for all claims and certainly not for claims that are obviously frivolous or insincere.

The Court should resurrect the compelling interest test for free exercise claims for this reason alone. As free exercise scholar Michael W. McConnell wisely has observed:

> If the Court wishes to consider a parade of horribles, it should parade the horribles on both sides. But while the two parades may be of the same length, they are of very different quality. The judicial system is able to reject claims that would be horrible if granted; believers are helpless to deal with infringements on religious freedom that the courts refuse to remedy.

Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1143 (1990).

Smith's closely connected preoccupation with the possibility of "anarchy" by creating for people of faith "a private right to ignore generally applicable laws" is misplaced. 494 U.S. at 886 and 888. Certainly the Court did not mean to suggest that an exception for people of faith from government restriction, which is specifically granted by the First Amendment, and which must be adjudicated by a court before the restriction is lifted, results in civil "anarchy." The Bill of Rights creates many

exceptions to otherwise neutral government restrictions, many of which are protected by the compelling interest test, without "anarchy."

In sum, the Supreme Court should re-establish the First Amendment's paramount protection for the religious freedom of all people of faith, and require government to demonstrate a compelling interest and narrow tailoring before it restricts that precious freedom.

B.

If *Smith* Is Overturned, RFRA Will Simply Codify Constitutional Law.

On its face, RFRA purports to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Therefore, if the Court overturns *Smith*, RFRA will simply codify constitutional law.

Since RFRA would merely codify existing constitutional law, the constitutional challenges pressed against it here would be

moot and the Court could decide the merits of the Archbishop of San Antonio's free exercise claim according to the constitutionally mandated compelling interest test without resort to RFRA.

C.

To The Extent RFRA Imposes A More Stringent Standard Than The Pre-*Smith* Constitutional Case Law For Prisoner Cases, This Court Need Not Reach That Issue In This Case Concerning A Zoning Restriction.

RFRA purports to establish a higher level of scrutiny for prison restrictions on the free exercise claims of prisoners than that established in pre-*Smith* jurisprudence. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (adopting the less stringent rational basis standard for free exercise claims in the prison context).

Admittedly, this Court's reversal of *Smith* will not resolve the constitutional questions which linger about Congress's authority to impose a stricter standard of review for prisoner cases than the Supreme Court has held the First Amendment requires. However, the case at bar is not a prisoner case, it is a zoning case, and the Court need not decide whether RFRA's provisions

for prisons are constitutional here. The plain and simple result of overturning *Smith* in this case will be the resurrection of the compelling interest test for the Archbishop of San Antonio's challenge to the City of Boerne's zoning restriction. Once that step is taken, the Court can simply decide whether the zoning restriction survives strict scrutiny under *Yoder* and its progeny.

CONCLUSION

It is with deep respect for the importance of faith in our society that the Commonwealth of Virginia urges the Court to re-analyze its reasoning in *Employment Division v. Smith* and to conclude that government regulation of religious exercise should be scrutinized as carefully as possible. Only strict scrutiny compelled by the First Amendment of the Constitution can adequately protect religious freedom, and the Constitution should be the sole source of legal protection that a person of faith should need to invoke against government impairment of that precious freedom. Therefore, the Commonwealth of Virginia urges the

Court to reverse its decision in *Smith* and reaffirm heightened constitutional protection for religious freedom.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By Counsel

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